SUPREME COURT, U.S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-495

ARCHIE JAMES SHUMAR,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF OF PETITIONER SHUMAR

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Arguments made in the Memorandum For The United States In Opposition to the Petition for Certiorari, in relation to the question whether the evidence presented was sufficient to support Petitioner Shumar's conviction, compel Petitioner to file this reply, pursuant to Rule 24(4), Revised Rules of the Supreme Court.

The government's statement of the facts and citations to particular pages of the transcript reveals no attempt

whatsoever to distinguish between Petitioner's placing of personal bets with the gambling operation charged in the case and the placing of "lay-off" bets. (Memorandum In Opposition, page 3)

Indeed, even the government's definition of a lay-off bet is inaccurate and misleading. (Memorandum In Opposition, footnote 4) As defined by the court in *United States v. Bobo*, 477 F.2d 974 (4th Cir. 1973) a lay-off bet occurs when a bookmaker has accepted a bet from a third party in an amount which he feels he cannot personally cover, and then transfers all or part of that bet to a second bookmaker or bookmaking operation, such as the gambling operation charged in this case. A similar definition of a lay-off bet, as necessarily involving a third party who originates the bet, was given in testimony in this case. (Tr. page 21) The government's definition does not include the necessity for a third party originator to be involved.

Petitioner contends that although he may have been placing his own personal bets with the gambling operation, he was not placing lay-off bets originated by third parties, and contends that the evidence is not sufficient to demonstrate his placement of lay-off bets.

The distinction between a personal bet and a lay-off bet is crucial to a determination whether the evidence was sufficient to convict Petitioner, in view of the technical requirements of 18 U.S.C. § 1955. The placing of lay-off bets has been held to fall within the statutory prohibition of 18 U.S.C. § 1955. *United States v. McHale*, 495 F.2d 15 (7th Cir. 1974); *United States v. Hunter*, 478 F.2d 1019 (7th Cir. 1973). However, the Courts of Appeal have rather consistently held that the language of the Act was not intended to include the player in an illegal game of chance, the person who participates in an illegal gambling

activity by placing a bet, or a customer or mere bettor with the gambling operation. *United States v. Harris,* 460 F.2d 1041 (5th Cir. 1972); *United States v. Becker,* 461 F.2d 230 (2nd Cir. 1972); *United States v. Bobo,* supra; *United States v. Hunter,* supra; *United States v. McHale,* supra; *United States v. Riehl,* 460 F.2d 454 (3rd Cir. 1972).

The legislative history of the Act, as supporting the interpretation that a mere customer or bettor is not included within the prohibitory language, was discussed in great detail by the 5th Circuit in *United States v. Harris,* supra.

At the eighth and ninth lines of page three of the Memorandum In Opposition the government refers the Court to a series of transcript pages to support the government's statement that petitioner "placed many lay-off bets with the operation." A review of those transcript pages reveals no evidence whatsoever that the bets being placed by petitioner were lay-off bets, contrary to the government's statement. Rather, a review of those transcript pages demonstrates that although petitioner had a significant volume of business with the gambling operation, the business consisted of his own personal bets, and that the owners and operators of the gambling operation had no knowledge as to petitioner placing lay-off bets.

At page six of the Memorandum In Opposition the government quotes a portion of the Court of Appeals' opinion concluding that petitioner placed lay-off bets. In arriving at this erroneous conclusion, the Court of Appeals relied substantially upon its notation that:

> "We find, however, that in his original brief filed on August 1, 1973, Shumar characterized the evidence against him: 'All that was shown was the laying off of bets . . .' ". (Shumar Pet. App. A-9)

Petitioner considers this reference to an unauthorized statement made by predecessor counsel in his original brief in the Court of Appeals to be misplaced, and indeed prejudicial to petitioner, and urges this Court to disregard that statement and the Court of Appeals reliance thereon.

As noted by the Court of Appeals, petitioner was permitted to change counsel in the Court of Appeals after the argument in the case and successor counsel was permitted to file a supplemental brief. (Shumar Pet. App. A-9) A review of the records of the Court of Appeals, and of the original brief filed in the Court of Appeals on behalf of petitioner, reveals that predecessor counsel did not even have the benefit of a transcript of the evidence at the time the original brief was prepared and filed. Both the form and the substance of the original brief leave a great deal to be desired. Furthermore, predecessor counsel failed to appear for argument of this appeal on behalf of petitioner at the time set by the Court of Appeals, after notice.

Out of a belief that he was not receiving effective representation on appeal, petitioner retained present successor counsel. The uninformed and unauthorized factual conclusions of predecessor counsel should not have been considered by the Court of Appeals in its determination, and should not be considered by this Court.

As discussed in the Petition each of the factual circumstances relied upon by the Court of Appeals, and in the Memorandum For The United States In Opposition, is equally consistent with the fact that petitioner was placing his own personal bets with the gambling operation as with the proposition that he was placing lay-off bets.

In conclusion, petitioner respectfully submits that certiorari should be granted as to each of the three questions presented in the Petition For Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Reply Brief Of Petitioner Shumar has been served upon the following counsel, pursuant to Rule 33(1)(3)(b), Revised Rules, Supreme Court of the United States, by depositing three copies of the same for each counsel in the United States mail with first class airmail postage prepaid.

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